91-398

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FIRST SOUTHERN INSURANCE COMPANY,
Petitioner,

v.

BRENDA MASSEY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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46

QUESTIONS PRESENTED FOR REVIEW

A.

Whether a summons properly *served* on a party *not* named in an action, which by its expressed terms warns *only* the named party that an appearance must be made to avoid a default judgment, without any other notice to the non-named recipient, and a subsequent default money judgment against the recipient, meets the requirements of procedural due process under the United States Constitution. (I.E., Whether notice to A that B will suffer default judgment if B does not file an answer is constitutionally sufficient to support a subsequent default judgment against A without any further notice to A.)

B.

Whether notice to a party that it *may* "intervene" in an action, without any other notice, and a subsequent default judgment against the party electing not to intervene meets the requirements of procedural due process under the United States Constitution.

C.

Whether the combination of the two documents described in (A) and (B) above increases or decreases the degree of constitutional notice to the recipient.

PARTIES TO THE PROCEEDING

In addition to the parties appearing in the caption of the case, the Court should note that Margarete Almy was named and served as a defendant in this declaratory judgment action and has filed no pleadings in either the district court or the circuit court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

RULES

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OPINIONS BELOW

The decision of the Circuit Court is unreported and is printed in Appendix A hereto, *infra*, p. 1a. The Memorandum Opinion and Order of the District Court is unreported and is printed in Appendix B hereto, *infra*, pp. 2a-5a.

JURISDICTION

The Eleventh Circuit Court of Appeals affirmed the judgment of the District Court on May 30, 1991. A timely Motion for Rehearing and Suggestion for Rehearing In Banc was filed by petitioner First Southern. The Petition and Suggestion were denied by Order of the Circuit Court on August 8, 1991.

This Court has jurisdiction to review the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Amendments V & XIV of the United States Constitution. The statutory provision involved is the Georgia Uninsured Motorist Act, O.C.G.A. § 33-7-11. They are printed in Appendix F, *infra*, pp. 14a-24a.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

This civil action is a declaratory judgment petition which was filed on April 26, 1990. (R1-1-1).

Petitioner First Southern Insurance Company (hereinafter "First Southern") filed the action and sought a finding of no liability for uninsured motorist coverage[1]

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[1] Uninsured motorist insurance in Georgia is almost identical, substantively and procedurally, to that provided by statutes in many states. This insurance provides benefits *directly* to the insured; it is first-party insurance, not third-party liability insurance. The insurer is obligated to pay its insured for a loss negligently caused by the uninsured or "underinsured" operator of another motor vehicle. The characteristic of uninsured motorist insurance which generates the most litigation is the unliquidated amount of the policy benefit: the amount owed depends on the subjective and widely variable "value" of a claim for bodily injury. To resolve disputes between a plaintiff and her own insurer, the insurer is placed in the position of a defendant in the tort case to contest issues of (1) tort liability; (2) amount of damages; (3) and where applicable, contractual liability to provide coverage. A review of the applicable law (O.C.G.A. § 33-7-11(d), Appendix F, *infra*, pp. 20a-21a) will reveal that the very first notice which an insurer might receive of a claim is a summons with a complaint attached. It is the expressly misleading nature of the summons served on First Southern which is the subject of this petition and which failed to meet the minimum requirements of procedural due process.

in connection with an automobile accident occurring on March 12, 1989.

Respondent Brenda Massey (hereinafter "Massey") had previously obtained a judgment against Margarete Almy (hereinafter "Almy") in the State Court of Muscogee County in the amount of $320,000.00. (R1-1-81). Massey contended in the state court action that she was operating an automobile owned by Jay & Gene's Pontiac of Columbus, Georgia. Massey contended that she was involved in an automobile collision with another vehicle, operated by Almy, and that Almy was liable to her for bodily injury damages. (R1-1-12).

After judgment, Massey contended that Almy was uninsured, and further contended she was covered by $300,000.00 in uninsured motorist coverage provided by First Southern under the insurance policy issued to Jay & Gene's Pontiac because, as a permissive user of the vehicle, she was defined as an insured. (R1-1-21).

Massey mailed a copy of the state court judgment to First Southern Insurance Company in Tampa, Florida and demanded payment in the amount of $300,000.00.

Massey also advised First Southern that if payment of the $300,000.00 was not made within 60 days as provided in the Georgia Uninsured Motorist Act, a claim would be made for 25% penalties and attorney fees for bad faith refusal to pay the claim.

Within 60 days of the submittal of this claim, First Southern filed the instant declaratory judgment action in the United States District Court, Middle District of Georgia, Columbus Division. (R1-1-1).

Almy filed no answer and has been in default throughout this litigation. She has filed no pleadings.

Massey filed an answer and counterclaim. The counterclaim reasserted the contention that Massey was en-

titled to $300,000.00 from First Southern. The counterclaim also asserted bad faith penalties and attorney fees despite First Southern's filing of a declaratory judgment action. (R1-2-1).

First Southern and Massey filed cross-motions for summary judgment. First Southern argued that the procedure under O.C.G.A. § 33-7-11, as interpreted by Massey, violated procedural due process under the United States Constitution.

On September 13, 1990, the Court entered a memorandum opinion, order and final judgment which denied First Southern's motion for summary judgment, granted Massey's motion for summary judgment, and entered judgment against First Southern and in favor of Massey in the amount of $300,000.00. (R2-15-1; R2-16-1; Appendix B, *infra*, pp. 2a-5a).

On appeal, the Circuit Court issued an Order on May 30, 1991 affirming without opinion the judgment of the District Court, pursuant to Circuit Rule 36-1. Petition for Rehearing and Suggestion of Rehearing In Banc were denied by the Circuit Court on August 8, 1991. Petitioner First Southern now seeks writ of certiorari to the Eleventh Circuit Court of Appeals for a review of its judgment.

B. Statement of Facts.

Massey seeks to recover $300,000.00 from First Southern as the result of an evidentiary hearing in the State Court of Muscogee County for which no one received notice, at which there was no opposition, and where the only witnesses were those called by Massey without cross-examination. The damage award which issued from this hearing is without any remotely plausible basis in fact.[2]

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[2] There was no record made of the proceedings. The state court computed $16,000.00 of medical expenses, $76,000.00 of future medi-

On or about March 12, 1989, Massey was riding as a passenger in a motor vehicle which was loaned to her by Jay & Gene's Pontiac. First Southern had in force at this time a policy of insurance, including uninsured motorist coverage with applicable limits of $300,000.00, covering motor vehicles owned by Jay & Gene's Pontiac. (R1-1-12).

On August 24, 1989, Massey filed suit in the State Court of Muscogee County, Georgia against Almy, alleging negligence and bodily injury damages. (R1-1-30).

Only one summons was issued by the state court clerk. The summons named only "Margarete Almy" as a defendant and stated:

> Margarete Almy, Defendant
>
> To the above named defendant: *You* are hereby summoned and required to file with the Clerk of said Court and serve upon Jefferson C. Callier, plaintiff's attorney, whose address is Post Office Box 2645, Columbus, GA 31902-2645 an answer to the Complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If *you* fail to do so, judgment by default will be taken against *you* for the relief demanded in the Complaint.

(R1-1-48; Appendix E, *infra*, p. 12a) (emphasis added).

Massey learned that Almy was uninsured at the time of the collision. Massey therefore attempted to perfect her claim for uninsured motorist insurance under the Georgia Uninsured Motorist Act so that the subsequent

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cal expenses, and "rounded out" this figure with general damages of $228,000.00. *The trial court offered no explanation of the $228,000.00 computation.* (R1-8-83; see Appendix C, *infra*, pp. 6a-9a). The damage award therefore totalled *exactly $320,000.00* but was subject to a set-off of $20,000.00 under Georgia law because of recoveries by Ms. Massey from collateral sources. This result is, at best, extremely convenient for Massey. She purports to be the holder of a judgment collectible in the amount of $300,000.00, and the alleged available insurance coverage is, coincidentally, $300,00.00.

resolution of her bodily injury claims would be binding against the insurer as well as Almy.

Massey identified First Southern Insurance Company as the motor vehicle insurer for Jay & Gene's Pontiac. Massey, through counsel, personally served upon the registered agent for First Southern a document drafted by counsel which stated that First Southern was being informed of the pendency of the bodily injury suit "for the purpose of allowing you to intervene in the above-stated case. . . ." (R1-8-153, Appendix E, *infra*, p. 13a). Attached to this document drafted by counsel was a photocopy of the state court complaint and a photocopy of the summons *issued to defendant Almy.* The complaint itself omitted *any* reference to First Southern and prayed for no relief against First Southern.

These documents were served on First Southern's agent on September 7, 1989. First Southern was never advised of any adverse consequence to it of failing to file an answer and therefore did not file one; First Southern did not desire to intervene and therefore did not do so. First Southern would receive no further communication about this litigation until Massey mailed copies of a $320,000.00 judgment with a demand for payment.

On January 29, 1990, the state court conducted a bench trial without any further notice. The only persons present were the state court judge, Massey, co-counsel for Massey, Massey's husband, and Massey's physician. (R2-Exhibit-32).

On February 1, 1990, the state court issued findings of fact that Almy was liable to Massey in the amount of $320,000.00. (R1-1-77).[3]

Massey advised First Southern that she expected payment of the $300,000.00 policy limits within 60 days of her March 5, 1990 letter. Otherwise, she stated that First Southern would be liable for a 25% penalty and

[3] *See* footnote 2, *supra.*

attorney fees for bad faith denial of her claim. O.C.G.A. § 33-7-11(j). First Southern filed the instant declaratory judgment action before the expiration of the 60 days.

Massey insisted that the findings of fact and judgment against Almy (comprised of findings of negligence, causation, and bodily injury damage) were binding on First Southern because of First Southern's failure to file an answer, and that absent any defense which indicated Massey was not covered by First Southern's policy, First Southern must pay the $300,000.00 provided in the policy.

First Southern stated that if Georgia law permitted a default judgment adjudicating its rights in property without any notice warning First Southern that this might occur as the result of failing to file an answer, the law was in violation of the due process clause of the United State Constitution.

This issue was resolved by a single sentence in the memorandum opinion and order of the district court:

> The Court specifically finds that . . . the documents served . . . were sufficient to meet . . . the requirements of due process under both the United States Constitution and the Constitution of the State of Georgia.

(R2-14-2; Appendix B, *infra*, p. 3a).

The memorandum opinion and order of the district court offered no explanation for this conclusion. Petitioner First Southern filed a Notice of Appeal. The circuit court affirmed, and petitioner now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I.

The resources and sophistication of a person or corporation are irrelevant to the question of how much constitutional notice is required before there may be state action resulting in a loss of property. Even the most sophisticated and knowledgeable defendant is entitled to notice necessary to meet the requirements of the Fifth and Fourteenth Amendments to the Constitution. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706, 2712, 77 Ed. 2d 180 (1983).

This Court in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) established a two-pronged test to determine the constitutional adequacy of the content of notification under procedural due process analysis:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to [1] apprise interested parties of the pendancy of the action *and* [2] afford them an opportunity to present their objections.

Mullane, 339 U.S. at 314, 70 S. Ct. at 657. (Emphasis and numbering added).[4] Only one decision of the Court has expanded on this analysis.[5] In *Memphis Light, Gas &*

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[4] The chief issue in *Mullane* was the method of notice, not the content of notice. The language cited here may be *dicta*.

[5] This Court has issued many decisions discussing the extent of notice required to meet the minimal requirements of constitutional procedural due process. A review of these decisions will reveal that they deal exclusively with the method or means of conveying notice to a party, *not* the content of the notice. *Mennonite Bd. of Missions, supra*; *Schroeder v. City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L.Ed.2d 255 (1962); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976); *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

A glaring omission in the cases previously submitted to this Court for decision is apparent, and warrants exercise of this

Water Division v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) [6] the court considered the second element mentioned in *Mullane*. The notice to the Crafts that their utilities would be cutoff failed to meet minimum due process requirements because it did not advise them of their right to appeal in order to "present their objections", although it did "apprise" them "of the pendancy of the action."

In the case at bar the notice fatally misled First Southern about the "pendancy of the action," First Southern was led to believe that only the rights of Almy would be affected. The resulting action was far broader and directly impacted the rights of First Southern. This case offers the Court the first opportunity to apply the first half of two-part requirement set forth in *Mullane*.

The document received by First Southern warned it only of proposed judicial action *against Ms. Almy*. The judicial action which resulted was entirely different from that which was described in the notice to First Southern. Instead of merely adjudicating negligence and damages issues against Ms. Almy, the trial court additionally de-

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Court's jurisdiction pursuant to Rule 10.1(c). The opinions previously written by this Court on the question of notice and procedural due process offer detailed guidance on the adequacy of the manner and means of notification. For example, this Court has written at length about when notice by publication passes or fails constitutional muster. In the case at bar, there is no dispute about the manner or means of notification. The documents received by the registered agent for petitioner First Southern were personally served.

[6] Petitioner believes that *Memphis Light* is the Court's only discussion of the minimal content required for constitutional notice since *Mullane*. A review of Shephard's Citations reveals no subsequent citation of *Memphis Light* in connection with those portions of the Court's opinion (West Key Number System Headnotes 6-8) dealing with the content of notice for purposes of procedural due process.

cided these issues against First Southern. Nowhere in the summons to First Southern was any warning given of this additional legal action.

Although this Court has spoken only once to the constitutionally required content of a notice, several of the factors relied on by this Court in other cases dealing with the manner of transmitting notification indicate strongly that the content of the notice at bar does *not* pass constitutional muster.

This Court has repeatedly ruled that where the name and address of a party is easily accessible, a litigant may not rely on less precise information as a basis for notification. In *Mullane v. Hanover*, this Court ruled that a notice was fatally flawed and particularly noted that the notice in that case ". . . does not even name those whose attention it is supposed to attract . . . ." *Mullane v. Hanover*, 339 U.S. at 315, 70 S. Ct. at 658. In *Schroeder v. City of New York*, this Court stated:

> The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.

Schroeder v. City of New York, 371 U.S. at 212-213, 83 S. Ct. at 282. The identity and address of First Southern Insurance Company were well known to Massey. Indeed, any person with a copy of their own automobile insurance policy would know the exact identity of the putative uninsured motorist insurer. The name and address of such a party is therefore almost always easily ascertainable. This raises the obvious question: are the requirements of procedural due process met by placing an easily ascertainable name and address on an envelope, or by providing this information to a process server, but omitting the name of this party from a description in the notice of

those persons who will be adversely affected by the proposed legal action? The previous decisions of this Court make it clear that an easily ascertainable name and address must be used in order to accomplish notification. There is no authority from this Court for the proposition that the identity of the party must be used only in the method of service but can be omitted freely from the substantive notice itself. Indeed, this Court in *Mullane* specifically referred to the omission of the name of the party from the notice.

This Court's decision in *Mennonite Bd. of Missions* offers an additional springboard for analyzing the issue at bar. In *Mennonite* the owner of real property was given notice of a judicial sale of property. The mortgage bank holding a substantial interest in the property was not given notice. This Court ruled that because the name and address of the mortgagee were easily ascertainable, due process required separate written notification to the mortgagee. *Mennonite Bd. of Missions*, 462 U.S. at 800, 103 S. Ct. at 2712. This Court's decision in *Mennonite* would not have been different if the mortgagee had been provided with written notification of the intent to conduct a judicial sale of merely the mortgagor's unencumbered interest in the property. In other words, if written notice had been provided to the mortgagee in *Mennonite* stating that *only* the owner's interest in the property would be affected by the judicial sale, the mortgagee could not reasonably be expected to object automatically. The mortgagee could properly consider the judicial sale only as transferring the owner's interest in the property (i.e., the equity, if any, in his home) remaining subject to all security deeds and other encumbrances on file. In this scenario, a mortgagee could reasonably refrain from responding to a notice, in essence allowing a substitution of mortgagors. Such a mortgagee could reasonably assume that a buyer at judicial sale would take the property subject to all previously filed encumbrances on the property.

The mortgagee would be quite surprised, despite such a written notice, to discover that the judicial action taken went far beyond that which was described in the written notice. The hypothetical written notice posed here described only legal action intended to affect the interests of the property owner. It would be unconstitutional for the state to permit such a broad and comprehensive judicial proceeding affecting the rights of the mortgagee when the notification advised the mortgagee of only a very limited judicial action which could affect the mortgagee only inferentially.

The case at bar is analogous to the hypothetical extension of *Mennonite Bd. of Missions* described above. First Southern received notification of a judicial proceeding which was described as potentially resulting in a default judgment against Margarete Almy. Nowhere in the notice to First Southern was *any* legal action described which might potentially have an adverse effect on its legal rights.

If the Georgia statute clearly stated that receipt of a summons to Ms. Almy under these circumstances would be construed as notice to the uninsured motorist insurer, there might be a colorable argument that procedural due process has been minimally served. This Court has previously ruled that the existence of legislation and the presumption of knowledge of such a law can create constitutional notice. *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982). The statute at bar (O.C.G.A. § 33-7-11(d), Appendix F, *infra* at pp. 20a-21a) nowhere contains any unambiguous statement that a summons not naming First Southern should be nonetheless construed as warning that its legal interests may be affected anyway. A reading of the statute reveals that First Southern shall be served with process "as though" a defendant in the case. The Georgia Civil Practice Act (like civil practice in almost every state and in the Fed-

eral Rules of Civil Procedure) provides that a defendant shall receive a summons directed to them, warning them that they will be in default if an answer is not filed. A straightforward reading of the Georgia statute strongly indicates that First Southern was entitled to a summons naming it. At this late juncture in the litigation, it is clear that the district court and the circuit court believe that the Georgia statute did *not* require a separate summons directed to the uninsured motorist insurer, and petitioner cannot in good faith represent to the Court that a matter of Georgia statutory construction is sufficient to meet the requirements of Rule 10.1(c). A review of the statute, however, is instructive; it supports First Southern's legal position that an uninsured motorist insurer is entitled to a separate summons naming it, and cannot remotely be construed as a unamgibous warning to uninsured motorist insurers that a summons naming only the uninsured motorist shall automatically be deemed constitutional notice to the uninsured motorist insurer that its legal rights will be affected by the litigaion. When construed in a manner most favorable to respondent Massey the statute is, at the very best, ambigous on the question of whether the uninsured motorist insurer is entitled to a notice advising it specifically that its interests might be affected. The statute presents no unambiguous warning that an insurer waives constitutional due process by doing business in the state of Georgia. The procedure at bar is common in many jurisdictions. The likelihood of repetition of this issue is high.

Likewise, there was no contractual waiver of due process by First Southern.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) this Court stated that one of the important factors to be considered in a procedural due process analysis was "the risk of an erroneous deprivation of such interest through the procedures used . . . ."

Mathews, 424 U.S. at 335, 96 S. Ct. at 903. The case at bar offers a vivid illustration that the "risk of erroneous deprivation" is extremely high in cases of this kind. The hearing at which issues of negligence and damages were adjudicated was completely *ex parte*. There was no notice to any party of the scheduling of this hearing. Furthermore, the facts at bar demonstrate beyond peradventure that the deprivation of property was completely erroneous in scope. No party has seriously contended at any point in this litigation that respondent Massey's general damages were *really* $228,000.00. The finding by the state court that Ms. Massey's general damages were in this precise amount can be explained only because it is the amount which, when added to the other elements of damage awarded, was precisely the amount necessary to gain access to the full amount of insurance available from First Southern. Petitioner respectfully submits that allowing the decision below to stand would encourage litigants to lull insurers with notices which do not warn of the intended legal action so that an *ex parte* hearing may be conducted where unrebutted evidence can be presented that the litigant's damages are coincidentally equal to the exact amount of available insurance coverage. The "risk of erroneous deprivation" described in *Mathews* strongly supports the grant of the writ in this case.

This Court established the outline of basic due process notification in *Mullane v. Central Hanover*. The Court applied one part of the two-part test in *Memphis Light v. Craft*. For the reasons set forth above, Petitioner believes that the instant case represents the Court's first opportunity to interpret and apply the remaining half of the test in *Mullane*, and therefore satisfies the requirements of Rule 10.1(c).[7]

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[7] The Court recently granted the writ to an insurance company on due process grounds. *Pacific Mut. Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S. Ct. 1032, —— L.Ed.2d —— (1991).

II.

Respondent Massey also served on First Southern an uncaptioned document which Massey's counsel stated was for the purpose of "allowing" First Southren to "intervene." For all of the reasons set forth above, the content of this notice does not pass constitutional muster. Intervention in Georgia Civil Procedure is, like intervention under the Federal Rules of Civil Procedure, a completely voluntary measure taken by the intervenor. There is no such thing as mandatory or compulsory intervention in Georgia. O.C.G.A. § 9-11-14; Federal Rules of Civil Procedure 14.

Counsel for petitioner has been a trial attorney practicing predominately in the state courts of Georgia for 25 years, and is unaware of any pleading or document such as that "allowing" First Southern to "intervene" authorized by Georgia law.

First Southern elected not to intervene in the litigation. Petitioner is unaware of any state or federal authority for the proposition that a decision to refrain from intervention can result in prejudice to or adjudication of rights in property. Consequently, the notice provided by Massey cannot meet the requirements of procedural due process described above.

III.

The summons which was served on First Southern warned only that the rights of Margarete Almy might be affected by the litigation. It offered no degree of constitutional notice whatsoever that the rights of First Southern might also be affected. Even if the summons received by First Southern amounted to any constitutional notice at all, the additional document "allowing" First Southern to "intervene" completely destroyed it. If there was any doubt by the uninsured motorist insurer about whether the papers served on it were intended to provide constitutional notice of possible *ex parte* adjudi-

cation of its rights, the document prepared by respondent's counsel removed it. This document was served with the summons and copy of the complaint and clearly states that the papers are being served on the uninsured motorist insurer for purposes of notifying them of the existence of the litigation and offering them an opportunity to intervene if they wish. Intervention is a completely voluntary procedure. A decision to refrain from intervention cannot, as a matter of law, cause any prejudice whatsoever. This document therefore erased any doubt whatsoever about the purpose of the documents served on First Southern. Any uninsured motorist insurer receiving these documents would understand that the purpose was *not* to require the insurer to file an answer. Instead, the purpose was simply to advise the insurer of the pending litigation so that they may intervene if they desire.

The summons served on First Southern does not pass constitutional muster. The invitation to intervene with which the summons was supplemented did *not* increase the level of constitutional notice. It was calculated to remove even the slightest suggestion that legal action adverse to First Southern would be taken or that an Answer should be filed to avoid a default.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 9, 1991

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8928

D. C. Docket No. 90-40-COL

FIRST SOUTHERN INSURANCE COMPANY,
Plaintiff-Appellant,

versus

BRENDA MASSEY and MARGARET ALMY,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(May 30, 1991)

Before HATCHETT, CLARK and DUBINA, Circuit Judges.

PER CURIAM:

Affirmed. See Circuit Rule 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: May 30, 1991
For the Court: MIGUEL J. CORTEZ
Clerk

By:/s/ David Maland
DAVID MALAND
Deputy Clerk

Issued as Mandate: Aug. 21, 1991.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 90-40-COL

FIRST SOUTHERN INSURANCE COMPANY,
Plaintiff

vs.

BRENDA MASSEY and MARGARET ALMY,
Defendants

MEMORANDUM OPINION AND ORDER

[Filed Sep. 13, 1990]

This is a declaratory judgment action filed by First Southern Insurance Company (First Southern) in which it names Brenda Massey (Massey) and Margaret Almy (Almy as Defendants. Massey has asserted a counterclaim against First Southern. Almy has not filed any defensive pleadings. First Southern has filed a motion for summary judgment and Massey has filed a motion for summary judgment in her favor on her counterclaim. The Court has given consideration to the briefs submitted by counsel and makes the determinations hereinafter set forth.

A collision occurred between vehicles operated by Almy and Massey on March 12, 1989. As a result of that collision Massey filed suit in the State Court of Muscogee County, Georgia, against Almy. Almy was properly served with process and, in addition, service was made

upon Casualty Company (Atlanta Casualty) and First Southern pursuant to the provisions of O.C.G.A. Sec. 33-7-11. Atlanta Casualty and First Southern were both uninsured motorist carriers through whom coverage was available to Massey.

The Court specifically finds that both First Southern and Atlanta Casualty were properly served, pursuant to the provisions of O.S.G.A. Sec. 33-7-11, and that the documents served upon First Southern and Atlanta Casualty and the method and manner of service were sufficient to meet the requirements of O.C.G.A. Sec. 33-7-11 and the requirements of due process under both the United States Constitution and the Constitution of the State of Georgia.

The Court further finds that, following service upon Atlanta Casualty, Atlanta Casaulty answered in its capacity as uninsured motorist carrier for Massey, filing pleadings in the name of Atlanta Casualty. Atlanta Casualty subsequently paid its uninsured motorist policy limits of $15,000.00 to Massey and withdrew its defensive pleadings. Neither Almy nor First Southern filed any pleadings or defenses whatsoever. The Court further finds that First Southern had actual notice of the pendency of the lawsuit and of its status as uninsured motorist carrier. Charles Drew, the registered agent for First Southern, was served on September 7, 1989, and he forwarded the pleadings to First Southern, and on October 10, 1989, he again informed First Southern that it had failed to file any defensive pleadings, but still had time to do so under Georgia law. The Court finds that, notwithstanding this information from its own registered agent, First Southern took no action.

Following service upon both Almy and First Southern the State Court of Muscogee County, Georgia, in due course, issued a valid order granting a money judgment in favor of Massey against Almy in the amount of $320,000.00

The Court determines that at the time of the collision Almy was an insured motorist, and that Massey was entitled to uninsured motorist coverage under a policy of insurance issued by First Southern with an uninsured motorist limit of $300,000.00. The Court therefore finds that there is no genuine issue as to any material fact, and that Massey is entitled to summary judgment as a matter of law with regard to the petition of First Southern for declaratory judgment, and that she is entitled to judgment on her counterclaim against First Southern as a matter of law.

The Court further determines that the filing of the declaratory judgment petition by First Southern does not insulate it from Massey's claim for a bad faith penalty and attorney's fees pursuant to O.C.G.A. Sec. 33-7-711(j), and directs that the issue of bad faith refusal to pay, if any, be set down for trial.

First Southern, as part of its declaratory judgment action, has sought judgment against Almy for any sums which First Southern might be called upon to pay to Massey. A review of the Court's file reveals that Almy has filed no defensive pleadings with respect to that claim and that she is in default. So, as a matter of law, First Southern is entitled to the relief sought against Almy.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

That the Plaintiff's petition for declaratory judgment against Brenda Massey be, and the same hereby is denied;

That the motion of First Southern Insurance Company for summary judgment be, and the same hereby is, denied;

That the motion for summary judgment of Brenda Massey with regard to her counterclaim be, and the same hereby is, granted and judgment will be entered in favor of Brenda Massey and against First Southern Insurance

Company in the amount of $300,000.00 this representing the limits of coverage available under the uninsured motorist insurance policy, together with interest from the date of judgment;

That the claim of Brenda Massey for a bad faith penalty and attorney's fees be set down for trial as soon as practicable; and

That First Southern Insurance Company have judgment against Margaret Almy in the amount of $300,000.00.

IT IS SO ORDERED, this 13th day of September, 1990.

/s/ J. Robert Elliott
J. ROBERT ELLIOTT
United States District Judge

APPENDIX C

IN THE STATE COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

Civil Action No.: SC-89-CV-13984

BRENDA MASSEY,

Plaintiff,

v.

MARGARETE ALMY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Feb. 1, 1990]

The record reflects that the Defendant Margarete Almy was properly and timely served with the Complaint and Summons in the above case by personal service on August 28, 1989. Defendant, failing to answer, went into default and a default judgment was entered on December 19, 1989, pending trial on the issue of damages as required by O.C.G.A. § 9-11-55.

This default case having come on for trial to the Court, jury trial having been waived, on the issue of damages in this personal injury action between Plaintiff Brenda Massey and Defendant Margarete Almy and testimony having been heard in open court from Brenda Massey, Champ Baker, M.D., and Paschal Brooks, D.D.S., the Court hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

On March 12, 1989, Plaintiff Brenda Massey suffered serious bodily injuries as a result of a car wreck caused by the negligence of the Defendant Margarete Almy. On impact, Plaintiff was thrown against the dash of the car with such force that the dash was broken. As a result she

suffered severe injury to her left knee which has necessitated two surgeries to repair the damage. These surgeries were performed by Champ Baker, M.D., orthopedic surgeon. In spite of the two surgeries Plaintiff suffers permanent impairment to the left knee which has been rated by Dr. Baker as a 7% permanent impairment. Plaintiff also has lost 20 degrees of flexion in the left knee joint and suffers atrophy of the left leg leaving the thigh one inch smaller than the right thigh.

The initial surgery was performed in July, 1989 and was an arthroscopic surgery performed for both diagnostic and treatment purposes. During surgery it was discovered that the trauma had torn the anterior horn of the left medial meniscus. Consequently, Dr. Baker cut out a portion of the synovium in order to relieve Plaintiff's symptoms.

Following surgery, Plaintiff suffered complications in the form of excess bleeding which occurred in the left knee. Also following surgery, the Plaintiff did not improve as expected and the testimony of Dr. Baker proves that Plaintiff's symptoms, in fact, became worse. Despite continued efforts at conservative care, it became apparent that a second invasive surgery would be necessary. In October, 1989 Plaintiff was admitted to Saint Francis Hospital, Columbus, Georgia where Dr. Baker performed open surgery on the knee. During this surgery, Dr. Baker repaired the torn medial meniscus and removed the fat pad in the knee which had become fibrotic. The Plaintiff was discharged on October 6, 1989 and has not regained full use of her knee. It is the opinion of Dr. Baker and the finding of this Court that Plaintiff has suffered an impairment of 7% of the left knee which is permanent in character.

Further, this Court finds that Plaintiff, Brenda Massey, has suffered additional permanent injuries as established by the testimony of Paschal Brooks, D.D.S. Plaintiff be-

gan treatment with Dr. Brooks in April 1989 as a result of headaches and jaw pain which Dr. Brooks subsequently diagnosed as being secondary to a temporomandibular joint disorder. Dr. Brooks testimony establishes that, as a direct and proximate result of the trauma of the collision occurring in March 1989, Plaintiff suffered serious injury to the temporomandibular joints for which she has been treated since the date of the wreck to the present time. As a result of these injuries Plaintiff, Brenda Massey, has suffered painful headaches and jaw pain. Despite continued treatment since April 1989 Plaintiff continues to suffer from the effects of these injuries. Dr. Brooks has testified and this Court finds that the injuries to Plaintiff's temporomandibular joints are permanent and have resulted in an twenty-one percent (21%) Whole Body Impairment.

Further, this Court finds, based on Dr. Brooks testimony, that Plaintiff will require future medical treatment to manage the symptoms secondary to the wreck in March 1989 in the amount of $1000.00-$2,000.00 per year for the rest of Plaintiff's life for physical therapy and approximately $600.00 per year for the remainder of Plaintiff's life for continued dental care. Dr. Brooks has also testified, and this Court finds that Plaintiff will be required to undergo a complete remake of her upper and lower dentures every three to five years at the cost of $2,000.00-$3,000.00. Should conservative care fail to achieve adequate stabilization of the temporomandibular joints, there exists the possibility of implants and crown and bridge work costing between $30,000.00-$40,000.00. The Court finds that Plaintiff, a 50 year old female, has a life expectancy of 30.81 years as noticed from the Annuity Mortality Table for 1949, Ultimate. The Court finds, based on the testimony of Dr. Paschal Brooks, that Plaintiff will incur future medical expenses in the amount of $76,000.00 after reduction to present cash value.

Plaintiff's medical expenses to date resulting from the wreck are in excess of $16,000.00.

The above constitutes the express findings of this Court based on competent evidence presented at trial.

CONCLUSIONS OF LAW

On March 12, 1989, Defendant's negligence was the sole proximate cause of the collision between the vehicle operated by Defendant Margarete Almy and the vehicle in which Plaintiff, Brenda Massey was a passenger. The Court also concludes that Plaintiff's injuries, permanent disabilities, past medical expenses, and future medical expenses were solely and proximately caused by Defendant's negligence. This Court finds that on March 12, 1989 Defendant Margarete Almy was an uninsured motorist as defined in O.C.G.A. § 33-7-11. It is the conclusion of this Court that Plaintiff, Brenda Massey is entitled to recover damages against Defendant in the amount of $16,000.00 as past medical expense, $76,000.00 as future medical expenses, and $228,000.00 for general damages.

This 1 day of Feb., 1990.

/s/ Robert G. Johnston
JUDGE ROBERT JOHNSTON

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8928

FIRST SOUTHERN INSURANCE COMPANY,
Plaintiff-Appellant,

versus

BRENDA MASSEY and MARGARET ALMY,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 30, 1991, 11th Cir., 19 —, —— F.2d ——)

[Filed Aug. 8, 1991]

Before: HATCHETT, CLARK and DUBINA, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular

active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ John W. Hatchett
JOHN W. HATCHETT
United States Circuit Judge

APPENDIX E

THE STATE COURT
FOR THE COUNTY OF MUSCOGEE
STATE OF GEORGIA

CIVIL ACTION

File Number ———

BRENDA MASSEY,

Plaintiff

versus

MARGARETE ALMY,

Defendant

SUMMONS

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to file with the clerk of said court and serve upon Jefferson C. Callier plaintiff's attorney, whose address is Post Office Box 2645 Columbus, GA 31902-2645 an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ Lanette Hooper
LANETTE HOOPER
Deputy Clerk of Court

IN THE STATE COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

Civil Action No: SC89CV13984

BRENDA MASSEY,

Plaintiff,

v.

MARGARETE ALMY,

Defendant.

TO: Charles L. Drew
Agent for
First Southern Insurance
880 West Peachtree Street
Atlanta, Georgia 30357

You are hereby notified that Plaintiff in the above styled action has filed a complaint seeking damages for the injuries to Brenda Massey. Brenda Massey was a passenger in a vehicle owned by Jay Pontiac. For your information, Jay Pontiac holds your File Number 210901.

This information is given to you for the purpose of allowing you to intervene in the above stated case under your uninsured motorist coverage.

[Filed Sep. 12, 1989]

By: /s/ Jefferson C. Callier
JEFFERSON C. CALLIER
Attorney for Plaintiff
Georgia Bar No.: 105250

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-

one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Official Code of Georgia, § 33-7-11

33-7-11. Requirements of motor vehicle liability policies; coverage of claims against uninsured motorist.

(a) (1) No automobile liability policy or motor vehicle liability policy shall be issued or delivered in this state to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle then principally garaged or principally used in this state unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits exclusive of interests and costs which at the option of the insured shall be:

(A) Not less than $15,000.00 because of bodily injury to or death of one person in any one accident, and, subject to such limit for one person, $30,000.00 because of bodily injury to or death of two or more persons in any one accident, and $10,000.00 because of injury to or destruction of property of the insured;

(B) Not greater than the limits of liability because of bodily injury to or death of one person in any one accident and of two or more persons in any one accident, and because of injury to or destruction of property of the insured which is contained in the insured's personal coverage in the automobile liability policy or motor vehicle liability policy issued by the insurer to the insured.

(2) The coverage for injury to or destruction of property of the insured, as provided in paragraph (1) of this subsection, may provide an exclusion of not more than the first $250.00 of such loss or damage to any insured in any one accident.

(3) The coverage required under paragraph (1) of this subsection shall not be applicable where any insured named in the policy shall reject the minimum coverage in writing. However, the insurer shall not be required to issue any coverage for any amount greater than the minimum coverage unless the insured shall request in writing such higher limits. The coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

(4) The application for discharge in bankruptcy by an uninsured motorist as defined in this Code section, or the appointment of a trustee in bankruptcy for an uninsured motorist as defined in this Code section, or the discharge in bankruptcy of an uninsured motorist as defined in this Code section shall not affect the legal liability of an uninsured motorist as the term "legal liability" is used in this Code section, and such application for voluntary or involuntary bankruptcy, the appointment of a trustee in bankruptcy, or the discharge in bankruptcy of such an uninsured motorist shall not be pleaded by the insurance carrier providing uninsured motorist protection in bar of any claim of an insured person as defined in this Code section so as to defeat payment for damages sustained by any insured person by the insurance company providing uninsured motorist protection and coverage under the terms of this chapter as now or hereafter amended; but the insurance company or companies shall have the right to defend any such action in its own name or in the name of the uninsured motorist and shall make payment of any judgment up to the limits of the applicable uninsured motorist insurance protection afforded by its policy. In those cases the uninsured motorist upon being discharged in bankruptcy may plead the discharge in bankruptcy against any subrogation claim of any uninsured motorist carrier making payment

of a claim or judgment in favor of an uninsured person, and the uninsured motorist may plead his discharge in bankruptcy in bar of all amounts of an insured person's claim in excess of uninsured motorist protection available to the insured person.

(b) (1) As used in this Code section, the term:

(A) "Bodily injury" shall include death resulting from bodily injury.

(B) "Insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise; any person who uses, with the expressed or implied consent of the named insured, the motor vehicle to which the policy applies; a guest in such motor vehicle to which the policy applies; or the personal representatives of any of the above.

(C) "Property of the insured" as used in subsection (a) of this Code section means the insured motor vehicle and includes the personal property owned by the insured and contained in the insured motor vehicle.

(D) "Uninsured motor vehicle" means a motor vehicle, other than a motor vehicle owned by or furnished for the regular use of the named insured, the spouse of the named insured, and, while residents of the same household, the relative of either, as to which there is:

(i) No bodily liability insurance and property damage liability insurance;

(ii) Bodily injury liability insurance and property damage liability insurance with available coverages which are less than the limits of the uninsured motorist coverage provided under

the insured's insurance policy, but the motor vehicle shall only be considered to be uninsured for the amount of the difference between the available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle and the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policy; and for this purpose available coverages under the bodily injury liability insurance and property damage liability insurance coverages on such motor vehicle shall be the limits of coverage less any amounts by which the maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage;

(iii) Bodily injury liability insurance and property damage liability insurance in existence but the insurance company writing the insurance has legally denied coverage under its policy;

(iv) Bodily injury liability and property damage liability insurance in existence but the insurance company writing the insurance is unable, because of being insolvent, to make either full or partial payment with respect to the legal liability of its insured, provided that in the event that a partial payment is made by or on behalf of the insolvent insurer with respect to the legal liability of its insured then the motor vehicle shall only be considered to be uninsured for the amount of the difference between the partial payment and the limits of the uninsured motorist coverage provided under the insured's motor vehicle insurance policy; or

(v) No bond or deposit of cash or securities in lieu of bodily injury and property damage liability insurance.

(2) A motor vehicle shall be deemed to be uninsured if the owner or operator of the motor vehicle is unknown. In those cases, recovery under the endorsement or provisions shall be subject to the conditions set forth in subsections (c) through (j) of this Code section and, in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured. Such physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant.

(c) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, the insured, or someone on his behalf, or in the event of a death claim someone on behalf of the party having the claim, in order for the insured to recover under the endorsement, shall report the accident as required by Code Sections 40-9-30 and 40-9-32.

(d) In cases where the owner or operator of any vehicle causing injury or damages is known, and either or both are named as defendants in any action for such injury or damages, a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company were actually named as a party defendant. If either the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance

company issuing the policy as though the insurance company were actually named as a party defendant; and the insurance company shall have the right to file pleadings and take other action allowable by law in the name of "John Doe" or itself. In any case arising under this Code section where service upon an insurance company is prescribed, the clerk of the court in which the action is brought shall have same accomplished by issuing a duplicate original copy for the sheriff or marshal to place his return of service in the same form and manner as prescribed by law for a party defendant. The return of service upon the insurance company shall in no case appear upon the original pleadings in such case. In the case of a known owner or operator of such vehicle, either or both of whom are named as a defendant in such action, the insurance company issuing the policy shall have the right to file pleadings and take other action allowable by law in the name of either the known owner or operator or both or itself.

(1) In cases where the owner or operator of a vehicle causing injury or damages is unknown and an action is instituted against the unknown defendant as "John Doe," the residence of such "John Doe" defendant shall be presumed to be in the county in which the accident causing injury or damages occurred, or in the county of residence of the plaintiff, at the election of the plaintiff in the action.

(2) A motor vehicle shall not be deemed to be an uninsured motor vehicle within the meaning of this Code section when the owner or operator of such motor vehicle has deposited, pursuant to Code Section 40-9-32, in the amount of $15,000.00 where only one person was injured or killed, $30,000.00 where more than one, or $10,000.00 for property damage.

(e) In cases where the owner or operator of any vehicle causing injury or damages is known and either or both

are named as defendants in any action for such injury or damages but the person resides out of the state, has departed from the state, cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, and this fact shall appear by affidavit to the satisfaction of the judge of the court, and it shall appear either by affidavit or by a verified complaint on file that a claim exists against the owner or driver in respect to whom service is to be made and that he is a necessary or proper party to the action, the judge may grant an order that the service be made on the owner or driver by the publication of summons. A copy of any action filed and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company issuing the policy were actually named as a party defendant. Subsection (d) of this Code section shall govern the rights of the insurance company, the duties of the clerk of court concerning duplicate original copies of the pleadings, and the return of service.

(f) An insurer paying a claim under the endorsement or provisions required by subsection (a) of this Code section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing such injury, death, or damages to the extent that payment was made, including the proceeds recoverable from the assets of the insolvent insurer, provided that the bringing of an action against the unknown owner or operator as "John Doe" or the conclusion of such an action shall not constitute a bar to the insured, if the identity of the owner or operator who caused the injury or damages complained of becomes known, bringing an action against the owner or operator theretofore proceeded against as "John Doe"; provided, further, that any recovery against such owner or operator shall be paid to the insurance company to the extent that the insurance company paid the named insured in the action brought against the owner or oper-

ator as "John Doe," except that the insurance company shall pay its proportionate part of any reasonable costs and expense incurred in connection therewith, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this Code section nor any other provision of law shall operate to prevent the joining in an action against "John Doe" or the owner or operator of the motor vehicle causing such injury as a party defendant, and joinder is specifically authorized.

(g) No endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any endorsement or provisions, nor may anything be required of the insured, subject to the other provisions of the policy or contract, except the establishment of legal liability; nor shall the insured be restricted or prevented, in any manner, from employing legal counsel or instituting legal proceedings.

(h) Before a motor vehicle shall be deemed to be uninsured because of the insolvency of an insurance company under division (b) (1) (D) (iv) of this Code section, an insurer under the uninsured motorists endorsement provisions of subsection (a) of this Code section must be given notice within a reasonable time by its insured of the pendency of any legal proceeding against such insurance company of which he may have knowledge, and before the insured enters into any negotiation or arrangement with the insurance company, and before the insurer is prejudiced by any action or nonaction of the insured with respect to the determinations of the insolvency of the insurance company.

(i) The endorsement or provisions of the policy providing the coverage required by this Code section may contain provisions which exclude any liability of the insurer for injury or destruction of property of the insured for which he has been compensated by other property or physical damage insurance.

(j) If the insurer shall refuse to pay any insured any loss covered by this Code section within 60 days after a demand has been made by the insured and a finding has been made that such refusal was made in bad faith, the insurer shall be liable to the insured in addition to any recovery under this Code section for not more than 25 percent of the recovery and all reasonable attorney's fees for the prosecution of the case under this Code section. The question of bad faith, the amount of the penalty, if any, and the reasonable attorney's fees, if any, shall be determined in a separate action filed by the insured against the insurer after a judgment has been rendered against the uninsured motorist in the original tort action. The attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services, based on the time spent and legal and factual issues involved, in accordance with prevailing fees in the locality where the action is pending. The trial court shall have the discretion, if it finds such jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend such portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this subsection in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of the attorney in the action against the insurer.

(2)

No. 91-398

In The

Supreme Court of the United States

October Term, 1991

FIRST SOUTHERN INSURANCE COMPANY,

Petitioner,

vs.

BRENDA MASSEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

A. Whether an uninsured motorist carrier, which has contractually agreed and is statutorily bound to pay for any damages to its insured caused by an uninsured motorist, provided that the carrier is given notice of the pendency of the suit against the tortfeasor by its insured, is constitutionally entitled to be served with a summons directed to it.

B. Whether the United States Constitution requires service of a summons upon an uninsured motorist carrier as a condition precedent to the insurance carrier's contractual and statutory liability to pay insurance benefits to its insured.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Page

Statutes Cited:

Rule Cited:

APPENDIX

No. 91-398

In The

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October Term, 1991

FIRST SOUTHERN INSURANCE COMPANY,

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BRENDA MASSEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

On March 12, 1989, Margarete Almy (hereinafter "Almy") negligently caused her automobile to collide with the automobile driven by respondent Brenda Massey (hereinafter"Massey"),

injuring Massey. Massey subsequently filed suit in the State Court of Muscogee County, Georgia, seeking money damages for her injuries. Based upon Massey's belief that Almy was or might be uninsured, Massey caused service to be made upon Atlanta Casualty Company and First Southern Insurance Company (hereinafter "First Southern"), both of whom provided uninsured motorist coverage available to Massey.

Service was made pursuant to the provisions of Official Code of Georgia Annotated § 33-7-11 upon First Southern Insurance Company. That Code section [Appendix F to the Petition for Writ of Certiorari, page 16(a)] gives the uninsured motorist carrier so served the option to answer the lawsuit in its own name, in the name of the uninsured motorist/tortfeasor, or do nothing.

The State Court action was served upon the agent for service appointed by First Southern, who promptly forwarded the pleadings to First Southern. In addition, counsel for Massey provided to First Southern by certified mail, with return receipt, a copy of the lawsuit being filed against the uninsured motorist, and personally discussed the lawsuit with First Southern's claim agent on the telephone. Notwithstanding actual personal service upon its designated agent for service, and actual receipt of the certified letter from respondent's counsel, and the personal telephone call from respondent's counsel, First Southern filed no pleadings.

Approximately thirty-three days after service upon First Southern, First Southern's agent for service learned that no defensive pleadings had been filed by First Southern, and informed the company of its right under Georgia law to pay costs and file pleadings. A copy of this letter to first Southern is attached hereto at Appendix A, *infra* at 1a.

On January 29, 1990, a trial was held in open court in

Muscogee County, Georgia, regarding the automobile accident. Evidence was presented as to the facts of the accident, and as to the respondent's injuries and damages. Following the trial, judgment was awarded to Massey against Almy (not against First Southern) in the amount of $320,000.

Massey then tendered the judgment to First Southern for payment pursuant to its contractual obligations under the policy of insurance which it sold, and First Southern has refused to pay the judgment.

On April 26, 1990, First Southern itself filed the instant action in the United States District Court for the Middle District of Georgia, Columbus Division, seeking a declaratory judgment of that court that no payment was due Massey under the uninsured motorist coverage afforded by First Southern. Massey filed defensive pleadings and a counterclaim, seeking judgment against First Southern for its uninsured motorist coverage.

The United States District Court granted Massey's motion for summary judgment pursuant to her counterclaim, and First Southern appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals affirmed the District Court's order, per curiam. First Southern then filed a motion for rehearing and a suggestion of rehearing en banc, which was denied. First Southern then filed a motion in the United States Court of Appeals for the Eleventh Circuit to stay the mandate, which motion was denied by the Eleventh Circuit. First Southern has now filed in this Court the petition for writ of certiorari, and a motion to stay the enforcement of the judgment. The motion to stay enforcement has already been denied by this Court.

B. Statement of Facts

Most of the facts of this case involve the proceedings in the

courts below, and thus many relevant facts have been set forth above in part A. In addition, the following facts are relevant to this action.

First, Southern Insurance Company sold an insurance policy, policy number 01552374, to Jay & Gene Pontiac in Columbus, Georgia, thereby subjecting First Southern to the rules and requirements of Georgia law regarding the sale of insurance policies in this State. One of those requirements is set forth in O.C.G.A. § 33-7-11, entitled "Requirements of motor vehicle liability policies; coverage of claims against uninsured motorists." (*See* Appendix F, page 16(a), Petition for Certiorari.)

Respondent herein, Brenda Massey, was an insured under that insurance policy, entitled to the benefits of the uninsured motorist coverage contained in that policy. On March 12, 1989, Respondent Brenda Massey was negligently injured by an uninsured motorist in an automobile accident. She subsequently filed suit against the tortfeasor, and served the uninsured motorist carrier, petitioner First Southern, with a copy of the pleadings she had filed against the tortfeasor, together with a notice specifically informing First Southern of the pendency of the action and of its opportunity to participate. In addition, a copy of the lawsuit against the tortfeasor was sent by certified mail to First Southern, and by telephone First Southern acknowledged receipt of that lawsuit.

First Southern now claims that, despite personal service of the underlying lawsuit upon its specifically named agent for service, and despite personal service upon the same agent of a notice of the pendency of the suit and of First Southern's right to participate, and despite personal receipt by First Southern by certified mail of the same lawsuit, and despite personal confirmation of receipt of the lawsuit by telephone, the notice to First Southern was insufficient to meet constitutional due process requirements.

SUMMARY OF ARGUMENT

The respondent respectfully submits that this is not a case which meets this Court's criteria for the granting of a petition for certiorari, and, more importantly, the case was correctly decided by the courts below in the first instance.

Contrary to the assertions of the petitioner, there was no default judgment taken against petitioner First Southern. There was a default judgment taken against Margarete Almy, the tortfeasor, following due and legal service of summons upon her. No party has ever questioned the validity of the service against the tortfeasor.

Georgia law requires insurance companies to pay judgments against uninsured motorists if the insured carries uninsured motorist coverage, and if notice of the pendency of the suit is given to the insurance company. (*See* O.C.G.A. § 33-7-11, Appendix F of Petition for Certiorari.) In the case at bar, it is undisputed that First Southern had actual notice of the pendency of the lawsuit and of its status as uninsured motorist carrier. Moreover, all of the courts below have held that the service upon the uninsured motorist carrier both met the statutory requirements for service, and that the statutory requirements do not violate due process of law. It is clear beyond question that the Constitution of the United States does not require service of a summons upon a party to a contract in order to invoke that party's contractual liability under that contract.

The petitioner's claim of "fatal confusion" is totally unsupported by the record and is in fact a claim made by the petitioner's lawyers, and not by the petitioner itself. There was and is no confusion on the part of First Southern. First Southern is liable to pay its contractual obligations under the insurance policy, and the District Court and the Eleventh Circuit Court of Appeals properly so held.

This is not an appropriate case for the granting of the petition for certiorari, and we respectfully pray that this Court deny the writ.

REASONS FOR DENYING THE WRIT

I.

The facts and circumstances of this case meet none of the criteria or considerations for the granting of a writ of certiorari in this Court, as set forth in Rule 10 of this Honorable Court. While respondent recognizes that these considerations set forth in Rule 10 to be considered by the Court are neither controlling nor exhaustive, respondent respectfully submits that they are clearly indicative of the fact that this Court should not grant the petition for the writ of certiorari in this case.

As stated in Rule 10 of the Supreme Court Rules, "a review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only where there are special and important reasons therefor . . . ." The petitioner has certainly shown no "special and important reasons" for the granting of the writ in this case. There has been no showing, nor can there be, that the decision of the Eleventh Circuit Court of Appeals is in conflict with the decision of any other United States Court of Appeals on the same matter; or that the Eleventh Circuit decision is in conflict with a decision of any state court of last resort; or that the decision has departed from the accepted and usual course of judicial proceedings. (*See* Rule 10.1(a), Supreme Court Rules.) Neither does this case involve a decision of a state court of last resort resolving a federal question in conflict with established federal decisions [*see* Supreme Court Rule 10.1(b)], nor an important question of federal law which has not been, but should be, settled by this Court, or that the Eleventh Circuit has decided a federal question in a way that conflicts with the decisions of this Court.

For the foregoing reasons, the respondent respectfully prays that this Court deny the petition; the case involves no questions of law which merit this Court's granting a petition for certiorari.

II.

The petitioner has misstated the question presented for review in this Court.

In its petition, First Southern has stated the issue as follows:

> Whether a summons properly served on a party not named in an action, which by its expressed terms warns only the named party that an appearance must be made to avoid a default judgment, without any other notice to the non named recipient, and a subsequent default money judgment against the recipient, meets the requirements of procedural due process under the United States Constitution, (i.e., whether notice to A that B will suffer default judgment if B does not file an answer is constitutionally sufficient to support a subsequent default judgment against A without any further notice to A).

This "issue" posed by the petitioner bears no relation whatsoever to the facts of this case.

The fact is that petitioner First Southern does not seek to overturn a default judgment against it (*i.e.*, against First Southern). On the contrary, the judgment which First Southern now asks this Court to review was obtained against First Southern as a counterclaim in a case brought by First Southern itself. As shown on page 2 of the petition of First Southern, First Southern itself filed the declaratory judgment petition in the United States District

Court, and respondent Brenda Massey fired a counterclaim, seeking to enforce the contractual and statutory liability of First Southern to pay a judgment which had earlier been rendered against the uninsured motorist tortfeasor, Margarete Almy. The petitioner's statement of the question, to the effect that a default judgment was taken against petitioner, is totally misleading and inaccurate.

The fact of the matter is that First Southern is not being called upon to pay a default judgment against it, but to pay a contractual obligation which it undertook in the form of an insurance policy which it issued. First Southern has been adjudged liable on that contractual obligation in a counterclaim filed by Brenda Massey, the respondent, in a lawsuit filed by First Southern itself. There can be no question that First Southern had notice of the pendency of that action, since First Southern filed it.

The petitioner's reliance upon *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and upon *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), are both misplaced and without merit. Having stated the question for decision to be something other than it actually is, the petitioner has attempted to bootstrap an argument based upon *Mullane, supra,* and *Memphis Light, Gas & Water Division, supra.* Those cases simply do not apply to the case at bar. Here, the petitioner First Southern contractually agreed to pay insurance policy benefits in the event certain conditions precedent were met. First Southern has filed a suit challenging whether those conditions precedent to contractual liability were all met, and, having had a full and ample opportunity to argue its case to both the District Court and the Eleventh Circuit Court of Appeals, both of those courts have held that all contractual conditions precedent have been met. There is simply no due process question to be decided.

III.

There is no genuine constitutional issue for decision by this Court. The petitioner has misstated the issue, and has attempted to parlay the case into one of constitutional proportions. Those constitutional issues simply do not exist under the facts of this case.

Moreover, the petitioner failed to preserve the constitutional claims which it now proposes as the basis for this Court's jurisdiction, by failing to present argument or citation of authority in the court below in support of those claims.

While petitioner now attempts to invoke this Court's jurisdiction based upon the notion that this case involves constitutional issues, petitioner wholly failed to present any argument or citation of authority in the court below in support of those issues.

The only reference in the petitioner's trial court brief with regard to its claim of unconstitutionality is found at page 11 of that brief, and states:

> Moreover, summons expressly directing Almy to file an answer within thirty days does *not* satisfy the requirements of notice to *First Southern* under procedural due process, pursuant to either the State or Federal Constitutions. U.S. Constitution Amendment 5, 4; Georgia Constitution Article I, § 1, paragraph 1. (Emphasis in original.)

Thus, petitioner failed to address what it now claims to be the constitutional issue in anything but the most cursory and conclusory fashion in the trial court. Not a single case was cited by petitioner in the trial court in support of its claim. Even in the brief of the appellant filed by First Southern in the United

States Court of Appeals for the Eleventh Circuit, not a single case was cited, and no substantive argument made, in support of its constitutional claims. Only in its reply brief and its petetion for rehearing did First Southern even cite *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) and even then its argument to the Eleventh Circuit only remotely resembled the argument which it now makes in this Court.

The petitioner having presented no argument to the trial court in support of its constitutional issue, the trial court quite appropriately dismissed that claim summarily, and petitioner has failed to preserve that issue for appeal.

IV.

From the inception of this case, First Southern has insisted that it was entitled to have a summons "directed to it", instructing First Southern that, if it failed to file defensive pleadings in the state court action against the tortfeasor, a default judgment would be taken against it. Such a notice would have been contrary to Georgia law, and would itself have been an abuse of process.

As the Court can see from a reading of O.C.G.A. § 33-7-11(d) [Apppendix F of the Petition for the Writ of Certiorari, page 16 (a)], the insurance company is not required to file an answer within thirty days of service upon it. Rather, the insurance carrier has an *option* to file defensive pleadings in its own name, in the name of the uninsured motorist, or both, or neither. To have instructed First Southern that it was required to file defensive pleadings within thirty days, as suggested by First Southern attorneys, would have been untrue and inappropriate.

Moreover, Georgia law *precludes* the issuance of a summons directed to the uninsured motorist carrier. In *State Farm Mutual*

Automobile Insurance Co. v. Brown, 114 Ga. App. 650, 152 S.E. 2d 641 (1966), the Georgia Court of Appeals dealt with this precise question, and held that the plaintiff is *precluded* from naming the uninsured motorist carrier as a defendant, and is consequently *precluded* from issuing process against it.

> State Farm contends that this statute does not authorize the insurance company to be named and served as a "nominal defendant" in a damage suit against a known uninsured motorist. We agree. The statute provides that "a copy of service shall be made upon the insurance company . . . *as though* such insurance company were a party defendant". (Emphasis supplied). The use of the words "as though" *precludes* the naming of the insurance company as a party defendant *and the consequent issuance of process against it* . . ." (Emphasis added.)

Brown, supra, 114 Ga. App. 650, 152 S.E. 2d 641 (1966).

Thus, the claim of First Southern that it was entitled to have process "directed to First Southern" is completely contrary to the plain reading of the statute and to the interpretation of that statute by the Georgia Court of Appeals.

V.

Petitioner's claim that the notice it received of the underlying tort action "fatally misled First Southern about the pendency of the action", is manufactured and ingenuine.

Petitioner had every opportunity to present any evidence it chose to the trial court regarding the effect of the notice it received as to the pendency of the tort action in the State Court of Muscogee

County, Georgia. In none of the affidavits filed in support of its position did any officer, agent or employee of First Southern claim to be misled, confused, or otherwise uncertain of what was to be done. The claim now made by First Southern's lawyers that it was "fatally misled" has been created by those lawyers, and is completely without any factual support in the record. If First Southern wished to claim confusion, it was incumbent upon the petitioner to present evidence which would support such a finding. No evidence was presented in that regard.

Moreover, a party to an insurance contract, in this case the insurance company itself, cannot avoid liability for its contractual obligations under that contract by claiming that it somehow became misled or confused. It is incumbent upon the insurance company to understand its options when served with an uninsured motorist lawsuit. Those options are clearly set forth in O.C.G.A. § 33-7-11(b), at page 21(a) of Appendix F of the petition for certiorari as follows:

> In the case of a known owner or operator of such vehicle, either or both of whom are named as a defendant in such action, the insurance company issuing the policy shall have the right to file pleadings and take other action allowed by law in the name of either the known owner or operator or both or itself.

Thus, as a matter of statutory law and contractual right, First Southern could have answered the underlying suit against the tortfeasor in the name of the tortfeasor or in its own name. It was incumbent upon First Southern, having elected to do business in the State of Georgia, to understand its obligations and rights with regard to the uninsured motorist coverage, and its current claim that it was "misled" is totally without merit.

CONCLUSION

This case meets none of this Court's criteria for the granting of the writ of certiorari. It is a contract case, and the issue in the case is whether or not the notice required by the Georgia statute is sufficient to invoke the petitioner's contractual liability under its insurance policy. There can be no doubt that the notice was constitutionally adequate.

For the foregoing reasons, the respondent respectfully prays that this Court deny the petition for the writ of certiorari.

October 9, 1991

Respectfully submitted,

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APPENDIX A — LETTER DATED OCTOBER 10, 1989 FROM CHARLES L. DREW, ESQ. TO FIRST SOUTHERN INSURANCE COMPANY

DREW, ECKL & FARNHAM
Attorneys at Law
880 West Peachtree Street
P.O. Box 7600
Atlanta, Georgia 30357
(404) 885-1400

October 10, 1989

Claims Manager
First Southern Insurance Company
First Southern Plaza
201 E. Kennedy Blvd.
P.O. Box 3370
Tampa, Florida 33601

RE: Brenda Massey vs. Margarete Almy
State Court of Muscogee County
Civil Action No. SC89CVI3984

Dear Sir:

Plaintiff's attorney advised Wray Eckl of our firm on October 10, 1989 that you had gone into default.

Georgia law gives you an additional fifteen days to answer if you pay the costs.

Very truly yours

s/ Charles L. Drew
Charles L. Drew

Appendix A

CLD/pdc

[Stamped] Another exciting assignment!
10-10-89
Sent this ltr. to First So.
10-10-89 per Mr. Eckl. Also
attached prior corresp. of 9-7-89
with copy of petition.
I called & verified address.
s/ Peggy (Boynton)

(3)

No. 91-398

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FIRST SOUTHERN INSURANCE COMPANY,
Petitioner,

v.

BRENDA MASSEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITIONER'S REPLY BRIEF

ARGUMENTS FIRST RAISED IN THE BRIEF IN OPPOSITION

Respondent Massey sets forth five arguments in support of her "reasons for denying the writ." They are as follows:

I. The issue presented by the petition is not an important question of federal law.

II. Procedural due process does not apply to the case at bar.

III. Petitioner did not preserve below its constitutional argument.

IV. Georgia law prohibits a summons which would afford due process.

V. Other factors cure the absence of due process in the case at bar.

The foregoing correspond to Sections I-V of respondent's "reasons for denying the writ" set forth in her brief in opposition. Petitioner will reply to each of these contentions in the order presented by respondent.

REPLY TO ARGUMENTS FIRST RAISED IN THE BRIEF IN OPPOSITION

I.

Respondent contends that the jurisdictional requirements for certiorari have not been met because this case does not present "an important question of federal law which has not been, but should be, settled by this Court." (Opposition, p. 6). Respondent nowhere cites a previous decision of this Court settling the issue presented by the petition. It must therefore be presumed that respondent's initial argument for denying the writ is that the issue presented is an *unimportant* question of federal law, or that for some reason the issue should not be settled by the Supreme Court.

The issue presented by the petition is whether the due process requirements of the United States Constitution and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 E.Ld. 865 (1950) are satisfied by notice of the pendency of legal action *against a different person. Mullane* clearly requires notice which would apprise interested parties of the pendency of the action. The question presented by this petition is *what action?* The Court in *Mullane* did not contemplate merely notification of *any* legal action. Obviously, this Court in *Mullane* assumed that its dicta about the content of due

process notice would be read to mean that the notice to a recipient would include a description or identification of proposed legal action *against the recipient, not an unrelated bystander.*

Nowhere in the opposition to this petition does the respondent challenge the elementary and profound importance of this constitutional idea. The respondent argues strenuously that due process has been waived, or that due process does not apply, or that the lack of due process has been cured by other events. But nowhere does the respondent deny the accuracy of the constitutional basis for this petition.

The constitutional issue is extremely important. This Court has discussed only once, in dicta, the constitutionally sufficient content of due process notification, *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657, and only once more when speaking to the requirement of "an opportunity to present . . . objections." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

The importance of the constitutional issue is plain. If persons or organizations pressing claims are allowed to achieve default judgments merely on the basis that a person was notified of legal action proposed against another, abuses of sharp practice and manifold unfairness will follow. Will a courtesy copy to an employer of a lawsuit served upon its employee automatically require the employer to file an answer? Will a copy of a summons and complaint served on the United States, describing an action against a defense contractor, automatically require the United States to file an answer?

In its very simplest terms, the constitutional question is what did this Court mean when it referred to "the action" in *Mullane*? *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657. Is notification of legal action proposed against a complete stranger sufficient? Is notification of legal action

against an alleged co-defendant or an alleged agent sufficient due process to support a default judgment against the recipient? Petitioner respectfully submits that "the action" referred to by this Court in *Mullane* is the action contemplated *against the recipient of the due process notification.* Otherwise, the procedural due process requirements of the United States Constitution will become a hollow protection, nothing more than a contest to determine how vague and imprecise a notice can be while still satisfying the Constitution.

Respondent asserts that the constitutional issue presented is not an important federal question, but offers no explanation for why it is not.

II.

Respondent asserts that "there is simply no due process question to be decided." (Opposition, p. 8). The argument presented here by respondent is incorrect for three reasons.

First, respondent argues that there was never a judgment against First Southern until the litigation in the district court below. Respondent argues that the state court litigation which preceded this declaratory judgment action resulted in no default judgment "against" First Southern, and therefore no necessity existed for due process in that proceeding. Respondent is correct that the judgment in the state court did not name First Southern as a judgment debtor. However, respondent's entire claim against First Southern is based on her assertion that the state court litigation resulted in an irrevocable resolution of negligence and damages issues which is binding and final against First Southern. The state court judgment was therefore clearly one "against" First Southern although First Southern was not named as a judgment debtor. This argument by respondent ignores the substance of the state court judgment and her own arguments before the district court. Respondent presented the

state court judgment as evidence to the district court and relied upon the state court judgment as a basis for her recovery on counterclaim. It was therefore undeniably a default judgment *against* First Southern.

Second, respondent argues, without any authority for support, that "it is clear beyond question that the Constitution of the United States does not require service of a summons upon a party to a contract in order to invoke that party's contractual liability under that contract." (Opposition, p. 5). Notwithstanding the fact that respondent Massey was *not* a party to the insurance contract, the constitutional proposition which respondent states is "clear beyond question" is clearly wrong. Although respondent was not a party to the contract, she could "invoke" her alleged rights as a third-party beneficiary by making a telephone call or writing a letter. However, where a party or third-party beneficiary to a contract seeks to enlist the jurisdiction and power of the courts to *enforce* a contract, the United States Constitution *does* require due process. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985).[1] The argument presented by respondent here is simply wrong.

Third, respondent repeatedly asserts that there is no due process issue in this case, but the district court and the circuit court disagreed. The circuit court affirmed the decision of the district court which was *expressly based upon application of due process principles.* The district court did not find that respondent Massey was exempt from procedural due process, or that procedural due

[1] Incidentally, dicta in *Shutts* offers a significant step from *Mullane* in the direction urged by petitioner. In *Shutts*, this Court stated that "[t]he notice should describe the action *and the . . . [persons] . . . rights in it.*" *Shutts*, 472 U.S. at 812, 105 S.Ct. at 2974, 86 L.Ed.2d 628. Without a summons to First Southern warning that its rights in property, as well as Ms. Almy's, might be affected, there could be no description of First Southern's "rights in the action."

process did not apply to this case. Instead, the district court concluded ". . . that the documents served upon First Southern . . . were sufficient to meet the requirements . . . of due process under both the United States Constitution and the Constitution of the State of Georgia." (Appendix "B," p. 3a). The district court was referring specifically to the alleged summons in the state court litigation. The district court therefore believed that principles of procedural due process applied, and concluded that notification to First Southern of legal action proposed against a different person constituted procedural due process. Respondent is the only person contending that she is somehow exempt from the requirements of constitutional due process.

III.

Respondent paradoxically asserts that the constitutional issue here was not preserved by petitioner below, yet provides a precise and direct quotation from petitioner's trial brief in the district court which logically and completely presents the constitutional argument. The quotation in the opposition brief to this Court speaks for itself. The constitutional issue was presented to the trial court and preserved for review by this Court on certiorari. (Opposition, p. 9). The district court apparently agreed that the constitutional issue was properly and sufficiently raised: it addressed the constitutional issue in its memorandum opinion and order of September 13, 1990. (Appendix "B," p. 3a).

Respondent also argues that "not a single case was cited" below by the petitioner. A significant portion of the petition for certiorari discussed the paucity of authority on this issue generally, and the complete lack of authority on the specific issue presented. (Petition, pp. 8-11). A review of the trial court brief, circuit court brief, and petition for writ of certiorari will reveal that petitioner has made a continuing and conscientious effort to develop the due process issue and bring all possible deci-

sional authority to the attention of the courts. The due process issue has not been waived at any juncture by petitioner.

IV.

Respondent next argues that Georgia law precludes the issuance of a summons which would warn the uninsured motorist insurer of the pendency of legal action against the insurer. At the outset, petitioner notes that reliance on state statutes and decisional law is not responsive to matters of constitutional due process. If the state law relied upon by respondent requires an unconstitutional result, it is not persuasive authority to this Court. It is simply unconstitutional.

It is only the respondent's interpretation of Georgia law which "precludes" the issuance of a summons accurately and fairly describing the contemplated legal action. Respondent argues that O.C.G.A. § 33-7-11 allows First Southern the *option* of filing an answer and that the filing of an answer is not required. Putting aside the fact that the statute nowhere states that this is an option (Appendix F, pp. 16a-24a), respondent's observation could be made about *any* civil action. Respondent readily admits (indeed relies upon) the proposition that the "option" to file no answer results in a binding default determination against an uninsured motorist insurer on issues of negligence and damages. *Any* litigant may refrain from filing an answer and suffer default, regardless of whether the case arises from the Georgia Uninsured Motorist Act. There is no explanation by respondent of why this "option" somehow precludes the service of a constitutionally sound summons.

Respondent also asserts that the case of *State Farm Mutual Automobile Ins. Co. v. Brown*, 114 Ga. App. 650, 152 S.E.2d 641 (1966) precludes due process notice to the uninsured motorist insurer. Respondent's interpretation of *Brown* is incorrect. The sole issue in *Brown*

was the elimination of reference to the uninsured motorist insurer in the complaint itself. The discussion by the court in *Brown* about the content of the summons was dicta. *Brown*, 114 Ga. App. at 656, 152 S.E.2d at 645.

More importantly, *Brown* was decided before the 1967 amendments to the Georgia Uninsured Motorist Act. Prior to 1967, the uninsured motorist carrier could not file pleadings in its own name, *and could not legally suffer a default judgment on any issues. Compare Brown* and *United Services Automobile Association v. Logue*, 117 Ga. App. 717, 162 S.E.2d 12 (1968) *with Doe v. Moss*, 120 Ga. App. 762, 172 S.E.2d 821 (1969). In *Brown*, there was no concern about procedural due process because the decision to file no answer could not result in a default judgment against the uninsured motorist insurer on any issues.

Respondent's interpretations of the Georgia statute and *Brown* are incorrect. Even if they were correct, they would be unconstitutional and nonresponsive to the argument presented by petitioner based on the absence of procedural due process.

V.

Respondent presents in the final section of her brief a variety of additional contentions why the writ should be denied.

Respondent contends that the burden rested upon First Southern to present evidence that the lack of due process notification caused actual confusion about whether legal action was pending against First Southern. Respondent offers no authority for this proposition. Indeed, this theory would open the door to evidentiary hearings which would be used to "cure" blatantly deficient notice. This Court has already ruled that the sophistication of a party is irrelevant to whether notice is sufficient under due process. *Mennonite Bd. of Missions v. Adams*, 462 U.S.

791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983). Notice must *objectively* satisfy the requirements of due process. An *ex post facto* factual inquiry into whether the lack of due process made any difference cannot be allowed to substitute for objectively sufficient notification.

Respondent also argues that First Southern, "having elected to do business in Georgia," somehow waived its right to procedural due process under the Constitution. Respondent presents no authority for this proposition, and cites no law in Georgia stating such a waiver.

Respondent implies that the contract of insurance included a waiver of due proces. Respondent has presented no evidence from the written contract or otherwise which shows any contractual waiver of constitutional due process.

CONCLUSION

After all of the fallacious arguments by respondent "that there is simply no due process question" are stripped away, the essence of respondent's opposition is that the constitutional issue presented is not an important one, and therefore does not satisfy the jurisdictional requirements of this Court.

The district court apparently agreed that a due process issue was presented and ruled on it.

Respondent offers *no argument whatsoever* disputing petitioner's interpretation of this Court's prior decisions in *Mullane* and *Memphis Light*. Indeed, the only argument which can be raised by respondent is that this Court in *Mullane*, when it required notice of "the action," meant that notice of some action other than the one intended against the recipient would be sufficient. A basic and important principal of procedural due process should be notice of "the action" which is proposed against the recipient of the notice, not notice of legal action against some other party. Any other interpretation of *Mullane* would

reduce procedural due process from a basic principle of constitutional law to a game played by lawyers. The issue presented is therefore one of sufficient importance to invoke this Court's jurisdiction on writ of certiorari.

Respectfully submitted,

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October 31, 1991